IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 350

ALL SERVICE LAUNDRY CORPORATION, *Petitioner*,

v.

LILLIAN MAUD PHILLIPS, as Administratrix of the goods, chattels and credits of CLIFFORD R. PHILLIPS, deceased, JOSEPH BONURA, TONY ZUMMO, TONY SALADINO, CHARLES SALADINO, PHILLIP PERRI, ALBERT JETT, DANNY FANTO, THELMA DOUGLAS, ADA BERKELEY, individually and on behalf of all other employees of defendant similarly situated.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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August, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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All Service Laundry Corporation (hereinafter referred to as "All Service") prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW.

The opinion of the District Court (R. 18-20) is reported in 55 F. Supp. 238. The opinion of the Circuit Court of Appeals (R. 47-54) has not yet been reported.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 2, 1945 (R. 60). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED.

1. Whether a laundry whose principal customer is a company which supplies laundry service to persons employed in commerce and industry is a "service establishment" within the exemption provided by Sec. 13 (a) (2) of the Fair Labor Standards Act of 1938.

2. Whether garments laundered for return to their previous users constitute "goods" under Sec. 3(i) of the Fair Labor Standards Act, which defines that term as not including "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

3. Whether the Fair Labor Standards Act applies to employees of a laundry all of whose customers and business transactions are within the State of New York, where 4% of the laundered garments ultimately moves in interstate commerce.

## STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are Sections 3 (i) and 13 (a) (2) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, et seq., which read as follows:

SEC. 3. As used in this Act—

* * * * * *

(i) "Goods" mean goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

* * * * * *

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

## STATEMENT.

This suit was initiated on October 15, 1942, in the United States District Court for the Southern District of New York, under Section 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1069, 29 U. S. C. sec. 216(b), to recover for the plaintiffs, and for others similarly situated, overtime compensation and liquidated damages. The original defendant was Star Overall Dry Cleaning Laundry Company, Inc. (hereinafter referred to as "Star"), but upon trial All Service was by stipulation made a party defendant. At the trial a written stipulation of facts was filed (R. 15, 16) and additional facts were stipulated orally (R. 10-14). No further testimony was taken.

The facts may be summarized as follows (R. 15, 16):

All Service is engaged in the laundry business, with all of its customers located within the State of New York. During the period in question 80% of its work of cleaning, pressing, and laundering overalls, slacks, coats, union suits, pants and hoovers was performed for Star. Both corporations have their principal place of business in Brooklyn, New York.

Star was engaged in the business of collecting soiled linens, overalls, slacks, coats, pants, union suits and hoovers, and of having them laundered or otherwise cleaned. It then returned them to its customers and was paid a fee for the service. During the period in question 95% of its business was with people within the State of New York and 5% with people outside the State of New York. Its business was done with individuals to the extent of 82% and 18% was "bulk," a term meaning that the soiled clothes were received in larger bundles than those collected from individuals (R. 13). Its customers were persons employed in various kinds of industrial, business and professional establishments.

The complaint was dismissed as to Star upon a finding that the plaintiffs were not its employees (R. 23). Judgment was entered against All Service in favor of each plaintiff for stipulated amounts without interest and for a stipulated attorney's fee (R. 24-25).

The defendants appealed from the judgment of the District Court (R. 26) and the plaintiffs took a cross appeal (R. 34) because of the disallowance of interest, an issue which they subsequently abandoned. After hearing argument, the Circuit Court of Appeals reversed the District Court and dismissed the complaint (R. 36-42) on the ground that the garments on which the plaintiffs worked were not "goods" within the Fair Labor Standards Act since that term as defined in Section 3(i) "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than the producer, manufacturer or processor thereof." Plaintiffs filed a petition for rehearing (R. 42-46), after which the court withdrew its original opinion and rendered a new decision affirming the judgment of the District Court (R. 47-54). Thereupon defendant petitioned for a rehearing (R. 55-58), which petition was denied (R. 59).

## REASONS FOR GRANTING THE WRIT.

### I.

**The Circuit Court of Appeals has erroneously decided important questions of Federal law which have not been, but should be, settled by this Court.**

1. *The scope of the "service establishment" exemption.*

Although taking it for granted that a laundry is a typical example of a service establishment, the Court below held that the employees of All Service did not come within the exemption of Sec. 13 (a) (2) because they would not have been exempt if employed by Star in the same capacity (R. 53). The Court does not explain why Star is not to be regarded as a service establishment, except to say that it was engaged in "production" rather than "servicing" (R. 53). Star's "production" consisted of supplying laundry service to persons working in commercial and industrial establishments (R. 15, 16). The decision below thus directly raises the question whether such activities make Star a "retail or service establishment" within the meaning of Sec. 13 (a) (2).

Prior to this decision it was generally accepted that businesses like Star's were service establishments since they qualified as such under the following provision in paragraph 27 of Interpretative Bulletin No. 6 of the Wage and Hour Division (CCH Labor Law Service, par. 32, 106):

> "The cleaning of garments such as uniforms worn by industrial workers will not alter the character of the establishment as a service establishment, if the work is performed at the normal price charged to private customers or if the transaction does not involve a quantity of goods materially larger than the normal quantity serviced for private customers."

Star even meets the Administrator's definition of *retail* service establishment, since under paragraph 18 of Interpretative Bulletin No. 6 nonretail sales which constitute

less than 25% of total gross receipts are not deemed sufficiently substantial to deprive the establishment of its retail character. The stipulation of facts reveals that 82% of Star's business was with private individuals (R. 16). Moreover, only 5% of Star's business was with customers outside of New York State (R. 15). Star is, therefore, one of "those retailers located near the state lines and making some interstate sales" for whom the exemption in Sec. 13 (a) (2) was intended. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

The indirect approach adopted by the Court below should not obscure the basic question, which is whether All Service, rather than Star, is a service establishment. This raises a question which has been troubling the Administrator and the courts for several years, namely, whether the exemption for "retail or service establishments" is to be restricted in its application to retail establishments alone. The conflicts which have arisen over this question in the Circuit Courts of Appeals are discussed below in Section II.

If the exemption should be construed as limited to establishments of a retail character, two important questions will remain as to what constitutes a retail service establishment. First, does a laundry cease to be retail because its customers use the cleaned garments in connection with their work in commercial or industrial establishments? As indicated above, the Administrator has heretofore regarded launderies as nonretail only if their sales were made to commercial or industrial firms, not when made to individual employees.

Second, does a laundry cease to be a retail service establishment because sales and deliveries to the ultimate consumers are made by another company? The Wage and Hour Division has consistently held that the intervention of such a company does not alter the retail character of the service performed by the primary establishment. This policy is set forth in the following official statement:

"Work performed by a central cleaning plant on the garments of private individuals will be considered work of an exempt type for purposes of Section 13 (a) (2) exemption even though the goods may be received through a branch or independent shop." Wage and Hour Field Operations Bulletin, Vol. II, No. 2, September 22, 1941 (2 C. C. H. Labor Law Service, par. 25, 551.831).[1]

Thus it appears that with respect to both Star and All Service the decision below reaches conclusions contrary to official interpretations of the Wage and Hour Division and adds to the confusion which has always existed concerning the proper application of Sec. 13 (a) (2).

2. *The significance of the exclusion of "goods after their delivery into the actual physical possession of the ultimate consumer."*

The plaintiffs worked on garments which had been sent out for laundering by persons who had worn and soiled them. They were regularly returned to the same users, who were thus the "ultimate consumer[s] thereof."[2] Articles cease to be "goods" within the definition of Section 3(i) of the Act "after their delivery into the actual physical possession of the ultimate consumer thereof." Hence the plaintiffs were not engaged in the production of goods for commerce and were not covered by the Act.

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[1] See also Wage and Hour opinion letter, September 20, 1940, holding that a local cleaning and dyeing establishment which does work for independent tailor shops in other states is exempt under Sec. 13 (a) (2) where the bulk of its business is intrastate (2 C. C. H. Labor Law Service, par. 25, 551.83). See similar Wage and Hour opinion letter: June 3, 1942, re watch repairing (*ibid* par. 25, 551.886); also Wage and Hour release September 26, 1941 (*ibid* par. 25, 551.8875).

[2] The record is silent as to who owned the garments. Since, however, the Circuit Court of Appeals made assumptions as to facts not in the record which are contrary to the actual facts, it is necessary to point out that the majority of the garments were the property of their users and that even the rented garments were regularly returned to the same users until they were worn out.

The Court below adopted this view in its first opinion but reversed itself on rehearing on the basis of the erroneous assumption that "a large part, if not all," of the garments were rented and "very likely" were not rented to the same customers each time after cleaning. The stipulation of facts states:

> "The defendant, Star Overall Dry Cleaning Laundry Company, Inc., during the period mentioned in the complaint was engaged in the business of collecting soiled linens, overalls, slacks, coats, pants, union suits, and hoovers, having the same laundered or cleaned and *returned* for a fee." (emphasis supplied) (R. 15.)

The use of the word "returned" establishes that the garments were repeatedly used by the same persons. Such users, it is submitted, are, in the common understanding and within the meaning of Section 3(i), the "ultimate consumer[s] thereof".

The Circuit Court of Appeals erroneously treated Star as the ultimate consumer and compared the work done by the plaintiffs with that performed by employees who repair machinery, stating, "Indeed, this recurrent cleaning and pressing was so like repairs for use that cases dealing with the effect of the statute upon employees engaged in making such repairs are in point." On June 18, 1945, this Court granted certiorari to the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Roland Electrical Co.*, 146 F. 2d 745, and to the Circuit Court of Appeals for the Sixth Circuit in *Boutell* v. *Walling*, 148 F. 2d 329, both of which involve the question of the application of the Act to such repairmen. If the analogy drawn in the opinion below is sound, the decision of this Court in those cases may have a substantial bearing upon the instant case.

3. *Non-applicability of the Fair Labor Standards Act to businesses essentially local in character.*

All Service dealt only with customers located within New York State and engaged in no transactions of which any element took place outside the State. Its principal customer, however, accounting for 80% of its business, made 5% of its sales to persons outside of the State (R. 15). There is nothing in the record to indicate whether or not these particular plaintiffs worked upon the garments which ultimately were transported across the State line. Assuming, however, that they did, such garments constituted only 4% of their output.

Thus, the facts show that All Service remained at all times essentially a local business and, as this Court declared in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570,

> "• • • we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

In its recent decision in *10 East 40th Street Building* v. *Callus*, 324 U. S. , this Court said:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

The same can be said for an enterprise like All Service, which conducts every element of its business transactions in New York State[3] and approaches the sphere of inter-

[3] The Wage and Hour Administrator has ruled that "in determining the applicability of the section 13 (a) (2) exemption, the selling or servicing of the establishment will be considered in intrastate commerce in all cases in which all the elements of the sale or service take place within the State in which the establishment is located, irrespective of the source of the goods and the retail or nonretail character of the transaction". Interpretative Bulletin No. 6, par 46, 2 C. C. H. Labor Law Service, Par. 32,106.

state commerce only through the fact that its principal customer does 5% of its business outside of the State.

If, under these circumstances, the activities of All Service employees constitute "the production of goods for commerce" within the meaning of Section 7 of the Act, 52 Stat. 1067, 29 U. S. C. sec. 207, then such production must be deemed so insubstantial as to justify the application of the maxim *de minimis non curat lex*. This Court intimated in the *Jacksonville Paper Co.* case (page 572) that a substantial part of an employee's activities must relate to goods moving in the channels of interstate commerce in order to bring into play the coverage of the Act.

The question of what constitutes a substantial part of an employee's activities for this purpose has repeatedly arisen and calls for clarification by this Court. See, for example, *Southern California Freight Lines* v. *McKeown*, 148 F. 2d 890 (C. C. A. 9, 1945); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10, 1944), and cases cited therein; *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Fla. 1941); *Whitsitt* v. *Enid Ice & Fuel Co.*, 6 Labor Cases par. 61,226 (D. C. Okla. 1942); *Brown* v. *Tracy Bottling Co.*, 6 Labor Cases par. 61,109 (D. C. Minn. 1942); *McDaniel* v. *Clavin*, 128 Pac. (2d) 821 (Cal. App. Ct. 1942), aff'd 136 Pac. (2d) 559; *Morrow* v. *Lee Baking Co.*, 4 Labor Cases, par. 60,701 (N. D. Ga. 1941); *Lamb* v. *Quality Baking Co., Inc.*, 3 Labor Cases, par. 60,042 (Tenn. Ct. App. 1940).

It is submitted that the test should be whether the employment remains essentially local in its character and its effect upon commerce.

## II.

**The decision of the Court below conflicts in principle with the decisions of the Circuit Court of Appeals for the Sixth Circuit in Lonas v. National Linen Service Corporation, 136 F. 2d 433, cert. den. 320 U. S. 785, and in Martino v. Michigan Window Cleaning Co., 145 F. 2d 163, as to which this Court granted certiorari on June 18, 1945.**

The conflict which exists among the decisions of the Circuit Courts of Appeals over the meaning of the "retail or service establishment" exemption was summarized in the opinion below as follows:

> "It has been held that despite the disjunctive 'or' between retail and servicing in subdivision (a) (2) of §13, the legislative history, coupled with other considerations taken to be persuasive, makes the proper construction of this subdivision one of the limitation of servicing to retail servicing, i.e., to the selling of services, instead of goods, at retail. Some of these cases are *Bracey* v. *Luray, supra; Guess* v. *Montague,* 140 F. (2) 500; *Walling* v. *Roland Electrical Co.,* 146 F. (2) 745; *Walling* v. *Sandok,* 132 F. (2) 77; and *Reynolds* v. *Salt River Valley Water Users Association,* 143 F. (2) 863. The contrary view was taken in *Lonas* v. *National Linen Service Corporation,* 136 F. (2) 433. See also *Martino* v. *Michigan Window Cleaning Co.,* 145 F. (2) 163; *Stucker* v. *Roselle,* 37 F. Supp. 864." (R. 52.)

Although the Court by reason of its erroneous assumption as to the character of Star avoided a direct holding on this issue, it makes quite clear its own preference for the theory that "retail or service establishment" should be construed to mean "retail service establishment" (R. 52, 53).

This construction ignores the plain language used by Congress to express its intention and misinterprets the legislative history of Section 13(a) (2).[4] It creates an artifi-

[4] In a letter dated July 2, 1942 the Administrator of the Wage and Hour Division wrote to Representative Fred A. Hartley, Jr., who was ranking member of the House Labor Committee which

cial and illogical distinction between a retail laundry and a nonretail laundry, both of which are essentially localized community services, employing the same type of workers, using the same type of equipment, performing similar functions and competing for the same business. No such distinction is made by other governmental agencies, Federal or State, which uniformly treat all branches of the laundry trade as a single category.[5]

On June 18, 1945 this Court granted certiorari in the *Roland Electrical Co.* case and the *Michigan Window Cleaning Co.* case, cited by the Second Circuit as representing conflicting views. The existence of conflict among the circuits on this question was recognized by counsel for the Wage and Hour Administrator in his memorandum in response to the petition for a writ of certiorari in the *Roland Electrical Co.* case. This memorandum also pointed out that "The divergency of judicial opinion as to the meaning of 'retail or service' in Sec. 13 (a) (2) has produced a difficulty in the administration of this portion of the statute".

Counsel for the petitioner contend that the instant case should have been decided in favor of the petitioner upon the authority of *Lonas* v. *National Linen Service Corporation*

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handled the Act as well as a member of the Conference Committee which drafted the final language of Section 13 (a) (2), as follows: "I am very much inclined to the view that all laundries, regardless of whether they do so-called commercial work or not, were intended by the Congress to be exempt, as you definitely state * * *." Cong. Rec. Vol. 89, p. A1024, 78th Cong. 1st Session.

[5] In the card catalog of the U. S. Department of Labor Library are nearly one hundred references to the laundry trades and working conditions therein. An examination of these references revealed unanimity in description of the laundry trades as service industries. There is not a single instance of an effort to distinguish between wholesale and retail laundries. The same is true of the minimum wage orders issued by the various states. See C. C. H. Labor Law Service, par. 45,501 under name of each state. The orders in Massachusetts, Ohio, and a number of other states specifically include in their definition of laundry trade or occupation "the collecting, sale, resale or distribution at retail or wholesale of laundry services."

and *Martino* v. *Michigan Window Cleaning Co., supra.* Since the principle involved in both cases will be passed upon by this Court during the next term, it is essential that this petition be granted so that the rights of the petitioner may be preserved.

None of the cases in which certiorari has been granted involves the laundry industry. Nevertheless, the disposition of these cases has a direct bearing upon the *Lonas* decision, in reliance upon which members of the laundry industry have assumed that they were exempt from the coverage of the Fair Labor Standards Act. It is, therefore, important that a case involving the laundry industry be before this Court when it has under examination the principle established in the *Lonas* decision.

## CONCLUSION.

This case involves important questions of Federal law which have not been, but should be, settled by this Court. The decision below leaves a large segment of the laundry industry in great confusion as to its status under the Fair Labor Standards Act. The conflicts which exist among the circuit courts of appeals concerning the scope of the service establishment exemption and the importance of this question in the administration of the Act have been recognized by this Court in the granting of certiorari in three cases to be heard at the coming term. It is appropriate that while this issue is before the Court the status of the laundry industry under the Act be clarified.

It is, therefore, respectfully submitted that this petition should be granted.

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ALBERT E. ARENT
August, 1945.

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*Respondents.*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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### Opinions Below

The opinion of the District Court is reported in 51 F. Supp. 238 (R. 18-20). The unanimous opinion of the Circuit Court of Appeals, affirming the judgment of the Trial Court, is reported in 149 F. (2d) 416 (R. 47-54).

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 2, 1945 (R. 60). Jurisdiction has been invoked under Section 240(2) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. for Writ, p. 2).

## Questions Presented

The petitioner has not specified any question with regard to whether respondents were employees "engaged in the production of goods for commerce". The only questions presented are:

1. Is petitioner a "service establishment" within the meaning of Sec. 13(a)(2)?

2. Are the garments processed and laundered by the respondents "goods" under Sec. 3(i)?

3. Have the respondents met the test of substantiality where 4% of the processed and laundered garments move "regularly and continuously each week" in interstate commerce?

The applicable statutory provisions are Secs. 3(i), 13(a)(2) (set forth on p. 3 of the Pet. for Writ), and 15(a)(1)[1] of the Fair Labor Standards Act (hereinafter referred to as the "Act"; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.).

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[1] Sec. 15(a)(1) of the Act makes it unlawful "to transport, offer for transportation, ship, deliver or sell in commerce, or to ship, deliver or sell with knowledge, that the shipment or delivery or sale thereof in commerce is intended, in goods in the production of which any employee was employed in violation of Sec. 6 or 7 * * *".

## Statement

All of the facts were stipulated. The respondents were employed as pressers and manglers by the petitioner, All Service Laundry Corp. (hereinafter referred to as "All Service") (R. 15, 16). The respondents' work consisted of operating machines which pressed washed linens, overalls, slacks, coats, pants, union suits, and hoovers, owned by Star Overall Dry Cleaning Laundry Company, Inc. (hereinafter referred to as "Star Overall") (R. 15-16, 22).

Star Overall rented the aforesaid garments, for a fee, to customers, including individuals and firms in various industrial and commercial businesses, such as telephone companies, insurance companies, railroads, bus companies, and airlines (R. 16). 18% of Star Overall's business was in bulk, i.e., laundry used by more than one individual (R. 13).

All Service did substantially all of the cleaning, pressing and laundering of the aforesaid garments for Star Overall (R. 16, 21). 80% of All Service's work of cleaning, pressing and laundering the garments was for Star Overall (R. 15).

"Regularly and continuously each week", 5% of the aforesaid garments of Star Overall, which were worked on and handled by the respondents, was delivered in interstate commerce (R. 11, 15, 22). Thus, 4% of the aforesaid garments worked upon, handled and pressed by the respondents (80% of 5%), regularly and continuously each week was shipped and delivered in interstate commerce.

The customers of Star had the physical possession of the goods only temporarily and returned them to Star after they became dirty. Star, in turn, delivered them to All Service for processing. While it may be true that Star's customers were the ultimate consumers, no delivery to them but for a special and limited purpose was shown. Star merely surrendered possession and regained possession at intervals while using the garments in conducting its own business.

## ARGUMENT

### I

**The Circuit Court's decision is not in conflict with the Circuit Court of Appeals for the Sixth Circuit, in *Lonas* v. *National Linen Service Corp.*, and in *Martino* v. *Michigan Window Cleaning Co.* The exemption contained in Sec. 13(a)(2) applies only to a service establishment selling services in small quantities to the consuming public.**

The petitioner in its writ (p. 11), in quoting from the decision of the Circuit Court, seeks to create the impression that the Circuit Court chose between conflicting views expressed by the Sixth Circuit and other circuits. The petitioner does not quote the last sentence of the paragraph of the Circuit Court's opinion, which states:

> "We do not now find it necessary to follow either one or the other of these conflicting views" (R. 52).

Assuming, *arguendo*, that a dispute exists between the various circuits as to whether the word "or", as contained in 13(a)(2) of the Act, should be read in the disjunctive or conjunctive, nevertheless the Circuit Court did not accept either one of these theories, but decided the case on the theory, as enunciated by this Court, that the purpose of Sec. 13(a)(2) was to make sure that employees working for local retailers near State lines who might not themselves be employed in a "local retailing capacity" so as to be exempted under Sec. 13(a)(1), would be exempted anyway. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *A. H. Phillips, Inc.* v. *Walling*, 323 U. S. ____; *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). The appellate courts have considered Sec. 13(a)(2) applicable to establishments similar in every way to a retail store, but selling

services rather than goods, in small quantities to the consuming public.[2]

It is clear that the exemption of Sec. 13(a)(2) was to take care of a small retailer near the State line and not a commercial laundry serving another laundry at wholesale. The requirements of Sec. 13(a)(2) are not met by the petitioner, which is engaged principally in servicing a linen supply company at wholesale where the linen supply company in turn, for a fee, rents the garments to commercial and industrial users. Here the petitioner is not engaged in making small sales in small quantities to the consuming public. The petitioner has only one substantial customer, which provides more than 80% of its business. Thus, the Circuit Court of Appeals decision is not in conflict with *Lonas* v. *National Linen Service Co.*, 136 F. (2d) 433, and *Martino* v. *Michigan Window Cleaning Co.*, 145 F. (2d) 163 (see Judge Clark's concurring opinion wherein he states that the decision in the case at bar "accords further with the views on cases such as" the *Lonas* and *Martino* cases). In the *Lonas* case it is clear that the laundry was soliciting the patronage of the general public and its activities were primarily devoted to serving the community and public generally. Clearly, on the facts, the *Lonas* case is distinguishable from the case at bar. All Service did substantially all of its business with Star Overall. All Service's activities were devoted primarily to serving Star Overall, and it did not come in contact with the public generally.

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[2] *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280; *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572-573; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526; *Walling* v. *Sondock*, 132 F. (2d) 77, cert. den. 63 Sup. Ct. 769; *Guess* v. *Montague*, 140 F. (2d) 500, 503; *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. (2d) 79 (C. C. A. 5); *Walling* v. *Sun Publishing Co.*, 140 F. (2d) 445 (C. C. A. 6); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9), cert. den. Nov. 6, 1944.

Exemptions from this statute must be strictly construed. The petitioner has the burden of pleading and proving such exemptions, and if there is any doubt as to the applicability of the exemption, it must be resolved against the petitioner.[3]

The petitioner places reliance upon correspondence between Congressman Hartley and the Wage & Hour Administrator (Pet. for Writ, p. 11). The Administrator of the Wage & Hour Division has, at all times, emphasized that any informal releases (as distinguished from formal interpretive bulletins), issued by him, are with respect to the enforcement policy of the Wage & Hour Division, and do not represent an interpretation of the Act, nor do they preclude recovery in employee suits under Sec. 16(b) of the Act. The Administrator, in fact, put in a brief amicus curiae, in support of the respondents' recovery in the case at bar, on the respondents' petition for rehearing in the Circuit Court of Appeals (see Judge Clark's concurring opinion, R. 54).

## II

**The exclusionary clause in the definition of "goods" was not intended to limit the scope of the phrase "production of goods for commerce", but merely to protect the ultimate consumer of goods from being subject to the penalties for violation of Sec. 15(a)(1).**

The purpose of the exclusionary clause in Sec. 3(i) was to make clear that the purchasing consumer should not be held responsible because of violations of the Act by an employer who produced an item of the consumer's personal property which he might carry with him out of the State.

[3] *Walling* v. *Reid*, 139 F. (2d) 323 (C. C. A. 8); *Stratton* v. *Farmers Produce Co.*, 134 F. (2d) 825 (C. C. A. 8); *Bush* v. *Wilson & Co.*, 157 Kan. 82, 138 Pac. (2d) 457 (Sup. Ct. Kan.); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616 (C. C. A. 8); *Thornberg* v. *E. Tenn. & W. N. C. Motor Transport Co.*, 157 S. W. (2d) 823 (Sup. Ct. Tenn.).

Certainly it was not intended to exempt the producing employer himself from the consequences of his failure to meet the statutory standards when working on the goods. The plain language of the clause indicates that respondents' work was performed before and not after the delivery of the goods (laundered garments) "into the actual physical possession of the ultimate consumer thereof". And, in any event, where, after its delivery to an ultimate consumer, an article is withdrawn for further processing or reprocessing, the words "after delivery", etc., refer to the delivery of the reprocessed article to its user, and not to the original delivery of the article before its withdrawal for further processing.

The courts have uniformly recognized, and no Circuit Court has ruled otherwise, that the clause merely "exempts the ultimate consumer from the penalties of Sec. 15(a)(1) and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce".[4] In other words, the clause was inserted in the statute "so that interstate transportation of goods may take place without responsibility for a prior production in violation of the standards of the Act".[5]

The legislative history,[6] as well as the language of the Act, when read in its entirety, demonstrate beyond any

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[4] *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353, 355 (C. C. A. 6), cert. den. 320 U. S. 761.

[5] See *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165, 171 (C. C. A. 4), cert. den. 317 U. S. 634; *Enterprise Box Co.* v. *Walling*, 125 F. (2d) 897, 899 (C. C. A. 5), cert. den. 316 U. S. 704; *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).

[6] See statement of Assistant Attorney General (now Mr. Justice) Jackson, before the Joint Committee of the Senate Committee on Education & Labor, and House Committee on Labor, Hearings Before Joint Committee, etc., on S. 2475, 75th Cong. 1st sess. (1937), p. 2. See also statement of Congressman Healey, id., p. 833. The Congressional concern lest the broad provisions of the Act result in the punishment of persons not responsible for, nor even aware of, the failure to observe the statutory standards, was repeatedly manifested at the hearings on the bill (Hearings Before Joint Committee, etc., supra, pp. 67, 70, 74), and the exclusionary clause in the definition of

doubt that only transportation of the goods by the ultimate consumer is within the scope of the exclusionary language.[7] By inserting the exclusionary clause in Sec. 3(i) Congress expressed its intention not to hold the ultimate consumer as a violator of Sec. 15(a)(1) for transporting "hot goods" across State lines. Otherwise, the ultimate consumer would be responsible for the wages and hours of employees who produced any item of his personal property which he might carry with him out of the State.

All of the Circuit Courts have recognized that this is the purpose of the exclusionary clause, and that, being for the benefit of the ultimate consumer, it cannot be invoked

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"goods" is simply a manifestation of that concern. The bill, as originally drafted, left no doubt whatsoever, that only the ultimate consumer was to be protected. It provided, simply, that "goods" "shall not mean goods in the possession of the ultimate consumer thereof". (S. 2475, introduced in the Senate on May 24, 1937, 75th Cong., 1st sess., Sec. 2(a)(21).) The purpose and effect of this provision were generally recognized by both the proponents and opponents of the bill, as freeing "the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods". See Statement of Joseph A. Emery, General Counsel, National Association of Manufacturers, Hearings Before Joint Committee, etc., supra, p. 639. See also statement of George H. Davis, president, Chamber of Commerce of the United States, id., p. 937.

While the definition of "goods" was extended and clarified by the Senate Committee, it is clear that the purpose and effect of the exclusionary clause remained unchanged. The revisions were made apparently as a result of the criticisms directed at the ambiguity of the definition with regard to its application to intangibles such as "stocks, bonds, etc." See Hearings Before Joint Committee, etc., supra, p. 524. Recognizing that the ultimate consumer might also be a producer of goods, Congress unequivocally expressed its judgment that any productive activities of the ultimate consumer should not be exempt from the Act.

[7] It may be noted that exemptions from this Act are "subject to strict construction". *A. H. Phillips* v. *Walling*, 323 U. S. ; *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8); *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283 (C. C. A. 8); *Ralph Knight* v. *Mantel*, 135 F. (2d) 320 (C. C. A. 8).

by a producer.[8] This is made particularly clear by the insertion in the definition of the words "other than a producer, manufacturer, or a processor thereof". There can be no question but that the respondents' activities were clearly within the broad scope of the definition of the word "produced" contained in Sec. 3(j) of the Act.[9] In fact, the petitioner has not brought up for review the decision of the Circuit Court that the respondents were engaged in producing, and that therefore the petitioner was a processor or producer.

Moreover, in any event, the term "ultimate consumer" does not negate the possibility of subsequent withdrawal of the article from the "ultimate consumer's" possession for *further processing or reprocessing*, and its later delivery to the same or other "ultimate consumers". A suit of clothes, which is worn out by its owner, and sold to a peddler, may be subsequently rehabilitated by a company specializing in the repair of old clothes and sold to a new "ultimate consumer". See and cf. *Walling* v. *Belikoff*, 147 F. (2d) 1008 (C. C. A. 2); *Campbell* v. *Zavelo*, 10 So. (2d) 29 (Ala., 1942). A sewing machine may be junked as scrap and eventually become part of a liberty ship. See, e.g., *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4). Very often the same piece of goods may undergo a number of successive productive processes followed by successive deliveries to one or more "ultimate consumers". While the

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[8] The Administrator of the Wage & Hour Division has long adhered to this view. See Interpretive Bulletin No. 5, U. S. Department of Labor, Wage & Hour Division, Oct. 1940, par. 6, 1940 Wage-Hour Manual 133. The Supreme Court has reiterated the principle that the Administrator's bulletins should be given considerable weight by the Courts. See *U. S.* v. *American Trucking Ass'ns*, 310 U. S. 534, 549.

[9] "Produced" is defined as "produced, manufactured, mined, handled * * * and for the purposes of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any process or occupation necessary to the production thereof * * *."

processing operations performed by the respondents were carried on, after the original delivery of the garments to their then "ultimate consumer", they took place before the delivery of a "new" article (cleaned, washed, processed and laundered overalls, again made wearable) to their new "ultimate consumer". The fact that the new consumer may happen to be the same person as the original consumer is purely incidental.[10]

The Courts have uniformly recognized the limited purpose and effect of the "ultimate consumer" clause, and have also consistently held the Act applicable in just the sort of situation as that presented here. In all of these cases articles which at one time had been delivered to their "ultimate consumer" were subsequently delivered by that consumer to a producer, manufacturer or processor who made them again wearable or usable and endowed them with new qualities.[11]

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[10] Many of the garments are owned by Star Overall, which rents them to industrial and commercial firms, which in turn issue them to their workers. The ultimate consumers of these garments are the workers who wear them; and it is most unlikely that the same firms get the same uniforms from the laundry, or that the same workers wear the same garments at all times.

[11] *Walling* v. *Belikoff*, 147 F. (2d) 1008 (C. C. A. 2), repair and alteration of secondhand clothes, and sales to new customers. *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4), junk yard selling scrap iron. *Campbell* v. *Zavelo*, 10 So. (2d) 29 (Ala., 1942), repair of secondhand shoes for the Army. *Slover* v. *Wathen*, 140 F. (2d) 258 (C. C. A. 4), repair of barges. *Orange Crush Bottling Co.* v. *Tuggle*, 27 S. E. (2d) 769 (C. A. Ga., 1943), purchase and collection of empty beer bottles. *Hertz Drivurself Stations, Inc.* v. *U. S.*, ..... F. (2d) ..... (C. C. A. 8), 8 Wage-Hour Rept. 900, not yet officially reported, maintaining and servicing of trucks leased for interstate commerce. *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4), repair of machinery for customers.

## III

**The respondents' functions have met the test of substantiality, and the respondents are entitled to the benefits of the Act where 4% of the goods was regularly and continuously each week distributed in interstate commerce.**

Any necessary test of substantiality is met under the authority of many cases holding that the Fair Labor Standards Act does not depend on the percentage or volume of goods moving in interstate commerce. The Courts have uniformly held that it is sufficient if the flow is not casual, sporadic, or utterly inconsequential. The Courts have permitted recovery where the percentage or volume of goods moving in interstate commerce was the same or less than the 4% involved in this case. *U. S.* v. *Darby,* 312 U. S. 100, 123; *Walling* v. *Peoples Packing Co.,* 132 F. (2d) 236 (C. C. A. 10), cert. den. 318 U. S. 774; *Schmidt* v. *Peoples Telephone Union,* 138 F. (2d) 13 (C. C. A. 8); *New Mexico Public Service Co.* v. *Engel,* 145 F. (2d) 636, 640 (C. C. A. 10); *Sun Pub. Co.* v. *Walling,* 140 F. (2d) 445, 448 (C. C. A. 6), cert. den. 322 U. S. 728; *So. Cal. Freight Forwarders* v. *McKeown,* 148 F. (2d) 890 (C. C. A. 9); *Sykes* v. *Lochmann,* 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan., 1943); *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (C. C. A. 6), cert. den. 320 U. S. 761.

The Supreme Court, in *U. S.* v. *Darby,* supra, said:

> "Congress * * * has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present-day industry, competition by a small part may affect the whole and the total effect of the competition of many small producers may be great * * * the legislation aimed at a whole embraces all its parts."

The Fair Labor Standards Act makes no distinction as to the volume of shipment in commerce, or amount of shipments in commerce, or in production for commerce, by any particular shipper or producer. It is immaterial from the viewpoint of national concern in protecting interstate commerce and protecting its channels to be used to spread sub-standard labor conditions by competitive pressure, to the injury of that commerce, that the shipments in such commerce do not constitute the major product of the producer.

The stipulated facts indicate that "regularly and continuously each week" 4% of the goods produced by the respondents moved into the channels of interstate commerce. Such a regular and continuous flow is not casual or sporadic and certainly cannot come under the maxim *de minimis non curat lex.* While the petitioner cites various cases (Pet. for Writ, p. 10) with respect to the test of substantiality, it does not claim that there is any divergence in the circuits as to what constitutes a substantial amount of production for interstate commerce. On the contrary, the cases uniformly hold that the applicability of the Act does not depend on the percentage or volume of goods, but on whether the percentage or volume is regular and recurrent, as it is in the present case.

## IV

**There is here presented no novel, substantial or important question of construction of a Federal statute not heretofore determined by this Court, nor is the decision of the Second Circuit in conflict with applicable decisions of this Court or of the other circuits.**

## CONCLUSION

**No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.**

Respectfully submitted,

CHARLES R. KATZ,
Counsel for Respondents.

BARNEY ROSENSTEIN,
SIDNEY S. WOLCHOK
and
JAMES L. GOLDWATER,
of Counsel.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 350.

ALL SERVICE LAUNDRY CORPORATION, *Petitioner,*

v.

LILLIAN MAUD PHILLIPS, as Administratrix of the goods, chattels and credits of CLIFFORD R. PHILLIPS, deceased, JOSEPH BONURA, TONY ZUMMO, TONY SALADINO, CHARLES SALADINO, PHILLIP PERRI, ALBERT JETT, DANNY FANTO, THELMA DOUGLAS, ADA BERKELEY, individually and on behalf of all other employees of defendant similarly situated.

## PETITION FOR REHEARING.

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March, 1946.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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### CITATIONS.

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## PETITION FOR REHEARING.

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*To the Honorable Chief Justice*
*and the Associate Justices of the*
*Supreme Court of the United States:*

Petitioner All Service Laundry Corporation, hereinafter referred to as "All Service", respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 25th day of February, 1946, denying its petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and in support thereof respectfully shows:

Petitioner asserted four defenses to the complaint, only two of which are pertinent to this petition, they being:

(1) The individual plaintiffs were not engaged in interstate commerce or in the production of goods for interstate commerce or in a process or occupation necessary to the production of goods for interstate commerce.

(2) Petitioner was engaged in the operation of a service establishment, the greater part of whose servicing was in intrastate commerce within the meaning of Section 13(a)(2) of the Fair Labor Standards Act and therefore exempt from the Act. (R. p. 7.)

This Court decided the case of *Roland Electrical Co.* v. *L. Metcalfe Walling,* ——— U. S. ———, 90 L. Ed. 326, on January 28, 1946, just prior to the denial of the petition in this case. In the Roland case this Court ruled adversely to petitioner's claim with respect to exemption under Section 13(a)(2) of the Act, but the Court clearly construed and applied the phrase "in the production of goods for commerce" so as to support petitioner's other defense, to-wit, that the plaintiffs were not engaged either in interstate commerce or in the production of goods for such commerce, and to this extent the decision rendered in this case by the Circuit Court of Appeals for the Second Circuit (149 F. (2d.) 416) is in conflict with the basic principles announced by this Court in the Roland case.

In the *Roland* case it was *stipulated* that twenty-seven of the thirty-three customers to whom the services were rendered

> "... were engaged in the production of goods for commerce as defined in Section 3 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Section 203, 9 F. C. A. Title 29, Section 203, shipping at least a substantial portion of their total production to points outside the State of Maryland."

Following this Court's previous decision in *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 86 L. Ed. 1638, (where services were rendered to a tenant engaged wholly in the *manufacture* of goods for commerce), this Court said:

"The work of petitioner's employees has 'such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."' "

The basis of the Court's opinion on the question of original coverage in the *Roland* case is found in the following language taken from the opinion:

"If not supplied to the customers by employees of the petitioner, such customers would have to employ comparable employees of their own or of other contractors."

Mr. Justice Burton was careful to append a footnote (3) to tne opinion, containing the following statement:

"The result reached makes it unnecessary to consider whether any or all of the petitioner's employees were engaged 'in [interstate] commerce' as distinguished from the 'production of goods for [interstate] commerce.' "

*In this case the stipulation with respect to the commercial activities of the customer is exactly contrary to that of the Roland case, the stipulation in the present case being:*

"The defendant Star Overall Dry Cleaning Laundry Co., Inc., is *not* engaged in manufacturing any of the garments which it rents." (Emphasis added.)

(R., p. 16).

Furthermore, the Circuit Court of Appeals for the Second Circuit *expressly* held in the present case that the plaintiffs, who merely pressed the clothes after they were washed, were not engaged in interstate commerce even though Star Overall transported a small percentage of the laundry in interstate commerce, the coverage on this aspect of the case being excluded by the decision of this Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, 497. The Circuit Court

of Appeals for the Second Circuit rested its inclusion of the plaintiffs within the Act solely upon the alternate provision relating to the production of goods for commerce, saying:

> "If these plaintiffs are within the statute it must be because they are engaged in the production of goods for commerce."

The Court then held that the cleaning and pressing of garments which were not in the process of manufacture or production but were only being serviced because they had become soiled after the sale and use by the ultimate consumer was work in an occupation necessary to the production of goods for commerce within the meaning of Section 3(j) of the Act.

It is earnestly insisted that this conclusion is manifestly erroneous. Clearly the phrase "necessary to the production" covers only the production, handling or work upon goods *as a part of the process of manufacture* either of the goods or some component part thereof as clearly implied by the decision of this Court in the *Roland Electrical* case.

As shown by the stipulation, the plaintiffs in this case in pressing the washed garments were not handling them in connection with the process of production or manufacture of the garments. The pressing was a step precedent to interstate commerce but it was not an act either necessary or incident to the *production* of the garments.

In this respect the holding of the Circuit Court of Appeals is in conflict with the express language of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1054, in which this Court in considering the scope of the phrase "production of goods for commerce", speaking through Mr. Justice Frankfurter, said:

> ". . . The normal and spontaneous meaning of the language by which Congress defined in Sec. 3(j), 29 U. S. C. A., Sec. 203 (j), the class of persons within the benefits of the Act, to wit, employees engaged 'in producing

> manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof,' encompasses these employees in view of their relation to the conceded production of goods for commerce by the tenants . . ."

In the *Kirschbaum* case Mr. Justice Frankfurter further said:

> "We cannot, in construing the word 'necessary', escape an inquiry into the relationship of the particular employees to the production of goods for commerce."

It seems abundantly clear that the language "handled, or in any other manner worked on", found in the definition of the word "production" in Section 3(j) of the Act, under the doctrine of *noscitur a sociis*, must be construed in its context so as to limit such handling and work to some part of the process of production as distinguished from the subsequent washing or pressing of the product after its completion, sale and use by the ultimate consumer. Manifestly washing or pressing *as a part of the process of manufacture* would be within the meaning of production of goods for commerce. It is equally clear, however, that washing or pressing long after the process of production ended, only for the purpose of removing soil as a result of the use of the finished product in the hands of the ultimate consumer, was never contemplated within the coverage of production for commerce even though (as in the present case) it might have been a step precedent to the transportation of such goods in interstate commerce. *Any other construction of the statute would render the Act universal in its application.* In any event the question is one of great importance which should be decided by this Court.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the order of this Court denying the petitioner's writ of

certiorari to the Circuit Court of Appeals for the Second Circuit be reversed, and the writ be granted.

Respectfully submitted,

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*Of Counsel:*

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## CERTIFICATE OF COUNSEL.

As counsel for the petitioner I do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

STANLEY I. POSNER,
*Counsel for Petitioner.*